PERKASA DUTA SDN BHD

v.

PERBADANAN KEMAJUAN NEGERI SELANGOR

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[SUIT NO: MT3-22-1075-1999]
7 JANUARY 2002

CONTRACT: *Performance bond - Plaintiff's application to restrain defendant's call on performance bond pending determination of action between parties - Whether defendant entitled to call on bond - Whether plaintiff established fraud or unconscionable conduct on the part of defendant*

The plaintiff entered into a contract with the defendant to construct and complete units of low cost houses. In compliance with the contract, the plaintiff provided the defendant with a performance bond. Dispute and differences arose between the parties in the course of carrying out the works concerned which led the plaintiff to terminate the contract and commence an action against the defendant. The defendant then proceeded to call on the performance bond. Hence, the plaintiff's application for an interim injunction to restrain the defendant from calling on the performance bond until the final determination of the action between the parties.

Held:

[1] The facts showed that the disputes between the parties disclosed *bona fide* serious issues to be tried. Also, the defendant, being a statutory corporation, was in a good position to pay any damages, if any, to the plaintiff should the plaintiff succeed in its action against the defendant. (p 312 e, g-h)

[2] The grant or refusal of an interlocutory injunction relating to the performance bond would also have to be looked at from cases relating to performance bonds. The court will not readily interfere with the exercise of rights contained in performance bonds. The task of the court in relation to the issue of a performance bond is one of contractual interpretation to discover the intention of the parties. (p 313 c & e)

[3] The performance bond was a conditional bond by virtue of cl. 1 thereof, and the defendant in making a claim on the bond merely had to state in the written demand to the bank that the plaintiff had breached the contract and the claim had to be made good or honoured. On the facts and principles of law, the defendant was entitled to make a demand on the performance bond. (p 313 g)

[4] The court will not intervene to injunct the exercise of the rights under the performance bond unless there is fraud or unconscionable conduct. The plaintiff had not established any fraud or unconscionability on the part of the defendant apart from the allegations resulting in the disputes with the defendant. (p 314 b)

[5] In respect of balance of convenience, the plaintiff might proceed with the main suit so that the rights and liabilities of the plaintiff and the defendant might be heard and determined. That might be expedited by ordering an early date to be given for the trial of the suit herein. (p 314 c-d)

[Application dismissed.]

Case(s) referred to:

American Cyanamid v. Ethicon [1975] AC 396 ***(refd)***

AR Fernandez & Ors v. National Union of Bank Employees [1986] 1 CLJ 456; [1986] CLJ (Rep) 117 ***(refd)***

Bains Harding (Malaysia) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd & Ors [1996] 1 BLJ 25 ***(refd)***

Esal (Commodities) and Relton v. Oriental Credit and Wells Fargo Bank NA [1985] 2 Lloyd's Report 546 ***(refd)***

Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd [1995] 1 CLJ 283 ***(refd)***

IE Contractors Ltd v. Lloyds Bank plc and Rafidain Bank [1990] 2 Lloyd's Rep 496 ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 ***(refd)***

Kirames Sdn Bhd v. Federal Land Development Authority [1991] 2 CLJ 1366; [1991] 3 CLJ (Rep) 27 ***(refd)***

Rimbunan Hijau Sdn Bhd v. Sarawak Plywood (M) Sdn Bhd [1985] 1 CLJ 424; [1985] CLJ (Rep) 275 ***(refd)***

South East Asia Insurance Bhd v. Kerajaan Malaysia [1998] 1 CLJ 1045 ***(refd)***

Teknik Cekap Sdn Bhd v. Public Bank Bhd [1995] 4 CLJ 697 ***(foll)***

The Brightside Mechanical and Electrical Services Group Ltd & Anor [1989] 3 MLJ 13 ***(refd)***

The Radio & General Trading Co Sdn Bhd v. Wayss & Freytag (M) Sdn Bhd [1998] 1 MLJ 346 ***(refd)***

For the plaintiff - Belden Premaraj; M/s Sivananthan
For the defendant - Koh Teck Wah; M/s Nordin Torji & Yussof Ahmad

Reported by Usha Thiagarajah

JUDGMENT

Low Hop Bing J:

Application

This is the plaintiff's application in encl. (6) for an interim injunction restraining the defendant from calling upon and/or receiving from Perwira Affin Bank ("the Bank") all or any monies pursuant to the Letter of Guarantee No. BGUTFC 9700147 (5981810098) dated 30 January 1997 as extended by a letter from the bank to the defendant dated 29 July 1999 ("performance bond") until the final determination of this action or further order of this court.

The grounds of this application are, *inter alia*:

(1) that the plaintiff had rightfully terminated the contract with the defendant on 3 November 1999 which was reiterated on 7 December 1999 due to the defendant's breach of fundamental terms of the said contract;

(2) that thereafter the defendant had terminated the said contract by faxing a notice purportedly dated 6 December 1999 to the plaintiff on 9 December 1999;

(3) that the defendant's demand on the performance bond is wrongful and *mala fide*; and

(4) that the balance of convenience is in favour of the plaintiff.

Submission For Plaintiff

Encik Belden Premaraj, learned counsel for the plaintiff, submitted that a restraining order may be granted against the beneficiary of a performance bond by applying the *American Cyanamid* principles and cited three authorities in support thereof; *viz. Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd* [1995] 1 CLJ 283; *The Radio & General Trading Co Sdn Bhd v. Wayss & Freytag (M) Sdn Bhd* [1998] 1 MLJ 346; and *Bains Harding (Malaysia) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd & Ors* [1996] 1 BLJ 25. It was also contended for the plaintiff that an interim injunction may be granted if there is a finding of fraud or unconscionability on the part of the defendant.

On the *American Cyanamid* principles, it was said that there is a *bona fide* issue to be tried. The other ground as noted above is that the balance of convenience is in favour of the grant of the injunction.

Contention For Defendant

En. Koh Teck Wah, learned counsel for the defendant, submitted that the performance bond is an "on demand" guarantee which is independent of any underlying contract and that as a proper demand has been made by the

defendant, payment should be made on the performance bond, the question of the breach or otherwise by the parties of the construction contract in dispute need not be considered.

It was stated for the defendant that the non-payment of the interim payments No. 10 and 11 can hardly be deemed to be "fraud" committed by the defendant.

Learned counsel also submitted that the extra test of unconscionability as enunciated by Kamalanathan Ratnam, J in *The Radio & General Trading Co Sdn Bhd, supra,* was wrong in the light of the Federal Court decision in *Esso Petroleum Malaysia Inc, supra*. In any event, it was argued for the defendant that the plaintiff had no right to terminate the construction contract and cannot use this purported termination as a reason for requesting the court to grant an injunction against the defendant from demanding on the performance bond on ground of unconscionability.

Decision Of The Court

Facts

The plaintiff is the main contractor appointed by the defendant *vide* Contract No. PKNS/BBS/P/KON-5/95 dated 7 October 1995 ("the contract") to construct and complete 1340 units of low cost houses at Section 7, Phase 3 Shah Alam.

In compliance with the provisions of the contract, the plaintiff provided, *inter alia,* the defendant with the performance bond for the sum of RM1,293,100.

In the course of carrying out the works, disputes and differences ("the disputes') arose between the plaintiff and the defendant eg, the defendant's delay in handing over possession of the site to the plaintiff; the defendant's variation orders, the delay in the defendant's payment in respect of interim payments No. 10 and 11 and defendant's deduction of a sum of RM724,764.72 from interim payment No. 10 and also an excess payment of RM306,850 to Selangor Industrial Corporation Sdn Bhd, defendant's wholly owned subsidiary, being allegedly in breach of cl. 4(a) of the contract. There was also the alleged fundamental breach of the contract by the defendant ie, the defendant's continued dishonour of its payment obligations and eventual purported termination of the contract by the defendant on 6 December 1999.

Factors For Court's Consideration

In hearing and determining an application of this nature, "all relevant matters have to be taken into consideration, in particular whether on the balance of convenience the *status quo* should be maintained and whether damages would be adequate remedy for the plaintiff": per Wan Hamzah SCJ (as he then was) in *A.R. Fernandez & Ors v. National Union of Bank Employees* [1986] 1 CLJ

456 at p. 463; [1986] CLJ (Rep) 117 (at p. 123); adopting with approval another Supreme Court decision in *Rimbunan Hijau Sdn Bhd v. Sarawak Plywood (M) Sdn Bhd* [1985] 1 CLJ 424; [1985] CLJ (Rep) 275 per Syed Agil Barakbah SCJ (as he then was).

More specifically, the Supreme Court in *Esso Petroleum Malaysian Inc v. Kago Petroleum Sdn Bhd, supra,* held that the principles enunciated by the House of Lords in *American Cyanamid v. Ethicon* [1975] AC 396 applies and can be considered in the exercise of a discretion in granting or withholding an interlocutory injunction in regard to a bank guarantee (per Peh Swee Chin FCJ (as he then was)).

The principles in *American Cyanamid, supra,* and the functions of a judge hearing an application for an interlocutory injunction have been succinctly set out by Gopal Sri Ram, JCA in delivering the judgment of the Court of Appeal in *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors.* [1995] 1 CLJ 293, at p. 305 as follows:

> (1) he must ask himself whether the totality of the facts presented before him discloses a *bona fide* serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry;
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> (2) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He is entitled to take into account, *inter alia*, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in a financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse the relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the judge would be entitled to dispense with the usual undertaking as to damages (see *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd*

a *& Ors* [1988] 3 MLJ 90). Apart from such cases, the judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee; and

b (3) the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the *status quo*, an expression explained by Lord Diplock in *Garden Cottage Foods Ltd v. Milk Marketing Board* [1984] AC 130; [1983] 2 All ER 770; [1983] 3 WLR 143 and applied in *Cheng* *c* *Hang Guan*. It is a judicial discretion capable of correction on appeal. Accordingly, the judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial. Any question going to the public *d* interest may, and in appropriate cases should, be taken into account. A judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion.

Serious Issue To Be Tried

e In respect of *bona fide* serious issues to be tried, the aforesaid disputes provide excellent illustrations of serious issues to be tried. Therefore, it is necessary for me to move on to the next step of my inquiry in respect of the justice of the case.

Justice Of The Case

f I shall now proceed to consider where the justice of the case lies. In so doing, I am of the view that an interlocutory injunction would be refused if eg, damages are an adequate remedy, in particular reference to guarantee bonds: *A.R. Fernandez & Ors*, SC, *supra*, and *Rimbunan Hijau Sdn Bhd*, SC, *supra*. The subject matter herein relates to the performance bond which has *g* specifically quantified the amount as RM1,293,100. In the event that the said sum in the performance bond is released, the damages, if any, suffered or incurred by the plaintiff are easily quantifiable and could be compensated in monetary terms. The defendant is a statutory corporation of the Selangor State Government and is in a good position to pay any damages, if any, to the *h* plaintiff should the plaintiff succeed in the writ of summons.

Further, as a matter of construction of the terms of the performance bond, an important clause ie, cl. 1 merits reproduction as follows:

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Now the Guarantor hereby agrees with the Principal as follows:

1. On the Principal's first written demand, the Guarantor shall forthwith pay to the Principal the amount specified in such demand notwithstanding any contestation or protest by the Contractor or Guarantor or by any third party and without proof or conditions.

The effect of the aforesaid clause is to render the performance bond a conditional "on demand" bond under which the guarantor ie, the bank has to pay the Principal, the defendant, on written demand and even the contestation or protest by the contractor ie, the plaintiff is of no consequence at all.

In this case before me, the grant or refusal of an interlocutory injunction relating to the performance bond will also have to be looked at from cases relating to performance bonds. It is trite law that the court will not readily interfere with the exercise of rights contained in performance bonds.

Bonds are issued so frequently in the world of commerce, in particular in the construction industry, that they have played a significant and crucial role in the formation of a contract and the performance thereof. In its legal sense, the word "bond" is loosely and generally used to include a group of documents and legal instruments such as contracts of guarantee, or of indemnity or an undertaking to pay. Attributive words may be added before the word "bond" eg, performance bond as in the instant case. The task of the court in relation to the issue of a performance bond, is one of contractual interpretation ie, it involves a straightforward exercise of construction, or interpretation of the bond to discover the intention of the parties: per Peh Swee Chin SCJ (as he then was) in *Esso Petroleum Malaysia Inc, supra*, following *IE Contractors Ltd v. Lloyds Bank plc And Rafidain Bank* [1990] 2 Lloyd's Rep. 496 CA.

In construing specifically the aforesaid clause in the performance bond, I am of the view that the performance bond as noted above is a conditional bond and the defendant in making a claim on the bond merely has to state in the written demand to the bank that the plaintiff has breached the contract and the claim has to be made good or honoured: *Teknik Cekap Sdn Bhd v. Public Bank Bhd* [1995] 3 MLJ 449 CA. This Court of Appeal decision has been affirmed by the Federal Court in [1998] 3 MLJ 25. Hence the defendant, as the beneficiary of the performance bond, needs only assert, pursuant to the performance bond, the basis of the claim in the notice to the bank: *South East Asia Insurance Berhad v. Kerajaan Malaysia* [1998] 1 CLJ 1045; *Esal (Commodities) And Relton v. Oriental Credit and Wells Fargo Bank NA* [1985] 2 Lloyd's Report 546 followed by the Singapore High Court in *The Brightside Mechanical And Electrical Services Group Ltd & Anor v. Standard Chartered Bank & Anor* [1989] 3 MLJ 13.

The defendant, as stated above, has called on and made a demand on the performance bond. On the facts of this case and applying the principles of law as stated above, I hold that the defendant is entitled to do so.

It is trite law that when it comes to a performance bond, the court will not intervene to injunct the exercise of the rights under the bond unless there is fraud or unconscionable conduct: *Kirames Sdn Bhd v. Federal Land Development Authority* [1991] 2 CLJ 1366; [1991] 3 CLJ 27, *The Radio & General Co Sdn Bhd, supra; Bains Harding (Malaysia) Sdn Bhd, supra*. The plaintiff has not established any fraud or unconscionability on the part of the defendant apart from the allegations resulting in the aforesaid disputes.

Balance Of Convenience

In respect of the balance of convenience, I am of the view that the plaintiff may proceed with the main suit so that the rights and liabilities of the plaintiff and the defendant may be heard and determined. This may be expedited by ordering an early date to be given for the trial of the suit herein.

Injunction Is Discretionary

It is an established principle of law that the grant or refusal of an interlocutory injunction is discretionary. The discretionary relief reflected in an injunction requires the court to consider all the circumstances, which I have adumbrated and considered above.

Conclusion

Applying the above principles to the facts of this case and for reasons stated above, I dismiss the plaintiff's application for injunction in encl. (6) with costs.